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CURRENT TOPICS.

A recent article by James L. High, Esq., in the *American Law Review*, entitled "What shall be done with the Reports?" has again aroused the discussion of the remedies for the evils entailed by the accumulation of the enormous number of volumes of precedents. The statistics collected by Mr. High are worthy of contemplation. In the edition of his Reporters in 1845, Mr. Wallace gives the entire number of reports, English and American, as sixteen hundred and eight—then considered an extraordinarily large number—and plaintively adds: "But *dum loquimur*, alas! the bookseller's boy opens the door, with an armful of new volumes, most of them from the Western States—the west of the western—where the sturdy stroke of the woodman must yet be resounding in the tribunals of justice." On April 1, 1882, in the figures of Mr. High, the aggregate number of volumes of reported decisions printed in the English language are 5,232, of which more than half, viz., 2,944, are American, State and Federal.

The remedies suggested for this state of affairs, which, with its attendant evils, is but too familiar to the profession, are: 1. The exclusion from the reports of all decisions except those of courts of final resort. 2. Leaving it within the discretion of the court to determine what opinions are to be printed. 3. The reduction of the amount of space devoted to the argument of counsel. 4. Removing the temptation of the reporter to unduly swell the number and size of the volumes, by depriving him of all pecuniary interest in them. For his fifth remedy, Mr. High says, by way of letting long-winded judges down easily: "Finally, the judges themselves should be reminded that the rapid accumulation of reports is, in a large measure, due to their own prolixity in the writing of opinions of undue length. The time for learned and elaborate essays, in the form of judicial opinions, with exhaustive reviews of all the authorities from the year books down, has long since passed. Hair splitting distinctions and exercises in dialectics should no longer find place in the literature of the law."

These suggestions, with one exception, meet with our heartiest concurrence. We do not believe that the best method of determining what cases are to be published is to leave it to the discretion of the judges. We believe that in those instances where this practice has been pursued, it has been found that, though immeasurably superior to the plan of printing everything that comes from the judicial hopper irrespective of the amount of chaff mingled with the occasional grains of wheat, it falls a long way short of giving complete satisfaction to anybody, even to the judges themselves, for it entails upon them considerable additional labor; and the dissatisfaction frequently produced among the members of the bar by the exercise of this discretion must be anything but pleasant. It does not follow either as a matter of course that the judges are the best possible persons to determine which of their opinions are of really substantial value to the profession as precedents. While judges are human it will sometimes be difficult for one to realize that an opinion over which he has spent days and nights of labor, is, after all, but a re-hash of the same doctrines, as lucidly and precisely expressed in a former adjudication. It will naturally occur, too, that the judges will get into the habit of deferring to each other in a matter so nearly personal in its nature, and, insensibly, what was originally intended to be the joint resolution of the whole bench that a certain opinion should be printed will, within time, come to be substantially only the resolution of the judge who delivered it, and who, in the nature of things, will give himself the benefit of any doubt which may arise; and consequently, many stale and trifling opinions will creep into the reports. It were much better, it seems to us, that the determination of what should and should not be printed, were placed in the hands of a committee of the bar, not so large as to be unwieldy, and composed of men of experience, wide learning and general practice, who should determine what proportion of the court's labors was worthy of preservation in the printed reports. Similar to this, we believe, is the plan in operation in England and in Canada.

CONDUCT PUNISHABLE AS CONTEMPT OF COURT.

The power to punish for contempt of court has been exercised in such a variety of instances as to almost defy classification; but in modern times it has become less arbitrary in its extent, and the limits set to its use present points of ever increasing interest.

Contempt in general has been well defined as a wilful disregard or disobedience of a public authority.[1] Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings.[2] This power is as ancient as any other part of the common law,[3] and is necessarily implied from the nature of a court of justice, as essential to the exercise of all other powers.[4] It is not every case of disobedience of the orders of a court, or apparent defiance of its authority, however, which constitutes a contempt. Thus there is no contempt where the matter required is beyond the jurisdiction of the Court.[5] So the court should not punish for contempt where the order disregarded is doubtful in scope or validity.[6] This principle has recently been invoked in contempt proceedings in a Federal court, to justify a marshal for disobeying an injunction order of dubious import, of which he had no previous notice, and which referred to a judgment without date, and of different amount from that recited in his execution.[7]

It has further been laid down that proceedings to punish for contempt will not be initiated or pursued where there is another available remedy, as by indictment;[8] where the party charged is unable to comply with the order of the court, and has not voluntarily created such disability;[9] or where the order disobeyed has been suspended by a stay of proceedings;[10] or where the party is no longer subject to the control of the court, as where the officer to whom a writ of *mandamus* is directed has resigned;[11] or an attempt is made to enforce it against an officer's successor.[12] Furthermore, it has been recently ruled that a party can not be adjudged guilty of a contempt, and confined in a jail as a punishment therefor, for any disobedience of a judgment or order, where by law an execution can be issued for the purpose of enforcing the judgment or order which has been disobeyed.[13] The effect of innocence of intention as depriving acts of their contemptuous character, has been the subject of much controversy, especially with regard to the violation of injunctions. It has sometimes been regarded as a valid excuse.[14] But the general tendency is to regard ignorance or good faith as immaterial;[15] and even advice of counsel as not a justification, but at most a mitigation.[16] So as to offensive language, it has been laid down that a disclaimer of intentional disrespect or desire to embarrass the administration of justice is no excuse, where the contrary would appear on a fair interpretation of the language used.[17] The current

[1] 1 Bouv. Dict. 352.

[2] Ibid. For other definitions shewing the scope and nature of contempt of court, see Rex v. Clements. 4 B. & Ald. 233; 4 Blackstone, 285; 3 Atk. 469, per Hardwicke, L. C.; 20 Am. L. Reg. 81, 82; Anderson v. Dunn, 6 Wheat. 204.

[3] Rex v. Almon, 5 Burr, 2686.

[4] United States v. Hudson, 7 Cr. 32; Resp. v. Oswald, 1 Dall. 329; People v. Turner, 1 Cal. 153; United States v. New Bedford Bridge Co., 1 Wood. & M. 401.

[5] Sparks v. Martin, Vent. 1; People v. Sturdevant, 5 Seld. 263; *In re* Morton, 10 Mich. 208; People v. O'Neil, 47 Cal. 109; 20 Am. L. Reg. 145, and cases reviewed.

[6] State v. Wheeling Bridge Co., 18 How. 421; Weeks v. Smith, 3 Abb. Pr. 211. So where proceedings had been hasty and unreasonable, United States v. Stanwood, 13 Int. Rev. Rec. 77.

[7] *In re* Carey, 10 Fed. Rep. 622, decided March 7, 1882, by the District Court. S. D. N. Y.

[8] *In re* Hirst, 9 Phila. 216; *In re* ——, 3 Nev. & Perry, 389.

[9] Galland v. Galland, 44 Cal. 478. See to the same effect Myers v. Trimble, 3 E. D. Smith, 612; Adams v. Haskell, 6 Cal. 316; *Ex parte* Cohen, 6 Cal. 318; Matter of Watson, 3 Lans. 208; *Ex parte* Thurmond, 1 Bailey (So. Car.) 605. But compare *Ex parte* Cohn, 55 Cal. 193.

[10] *Ex parte* Thatcher, 2 Gil. 167.

[11] United States v. Justices of Lauderdale, 10 Fed. Rep. 460; s. c., 13 Reporter, 422: 14 Cent. L. J. 210, (Circuit Court, W. T. Tenn., January 27, 1882).

[12] *Ex parte* Tinkum, 54 Cal. 401.

[13] Baker v. Baker, 23 Hun, 356. See also Haines v. Haines, 35 Mich. 138.

[14] See the recent case of Strobridge v. Lindsay (U. S. Circuit Ct., W. D. Pa., March 28, 1881,) 11 Reporter, 734, where the injunction was against the infringment of a coffee mill patent. So where a police officer has re-arrested a discharged prisoner in good faith under the instructions of the police commissioners. Matter of Fitton, 16 How. Pr. 303.

[15] State v. Simmons, 1 Ark. 265; People v. Few, 2 Johns. 290; Matter of Moore, 63 N. C. 397. See also Wartman v. Wartman, Taney, 362; *Re* Woolley, 11 Bush. 95.

[16] Columbia W.P. v. Columbia, 4 Rich. (N. S.) 388; and see People v. Compton, 1 Duer. 512.

[17] People v. Wilson, 64 Ill. 195. See to the same ef-

view has been reiterated in a case recently decided by the Supreme Court of North Carolina.[18] That tribunal declared that if it be ascertained, in a proceeding for contempt, that a judicial mandate is wilfully and intentionally disregarded, the penalty is incurred, whether an indignity to the court or contempt of its authority was the motive or not. In the case before the court, the defendant was held guilty of contempt in disobeying an order restraining him from carrying on the business which, with his good will, he sold to the plaintiff under an agreement to discontinue it himself.

The most direct cases of contempt concern conduct toward judicial officers. By the common law every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence, without which no court could vindicate or support the laws intrusted to its administration.[19] The fundamental character of this authority is reiterated in the decisions in various forms. Thus we find it remarked that one general principle, incidental to all courts, as well inferior as superior, was a power to commit for contempt, either by word or deed, offered in the presence of the court; and that this power was not against Magna Charta, or the law of the land, but formed a part of the common law.[20]

An attempted classification of contempts, which has been properly criticised but has the support of many authorities, draws a distinction between direct contempts and those which are constructive or consequential. The former class is stated to comprise those which are committed in the presence of the court, or by disobedience of its orders or process. It covers contempts which openly insult or resist the powers of the court or the persons of the judges, even when the latter are not in court.[21] The second division is said to embrace those which are not of such a positive and direct character, but plainly tend to create a universal disregard of the authority of the courts.[22] Illustrations of the former class are afforded by abusive language to the judge, or violation of an injunction; of the latter, by improper publications reflecting on the court or the parties.[23] The distinction is stated to be important, because of the resulting difference in the proof required of the contempt. But the real distinction as to procedure seems to be between contempt committed in the immediate view and presence of the court,[24] and those not so committed.[25] In the former, the offender may be instantly apprehended and punished without any further examination or proof. But in the latter, which consist of matters arising at a distance, and of which the court can not have a perfect acquaintance, or take judicial knowledge, the proceeding must be in a different way, and the party accused is entitled to be heard in his defense.[26] But the force, even of this distinction is largely lost by regarding acts as done in the constructive presence of the court. Thus it is laid down that all acts calculated to impede, embarrass or obstruct courts of justice, should be considered done in presence of the court, and this is applied to contemptuous acts of officers of the court committed elsewhere than directly in its presence.[27]

In regard to the scope of the phase of the offense which is directed against those occupying judicial positions, it has been declared that every insult offered to a judge in the exercise of the duties of his office is a contempt.[28] But a judge should bear in mind that he is engaged, not so much in vindicating his own character, as in promoting the respect due to the administration of the laws; and this consideration should induce him to receive as satisfactory any reasonable apology for an offender's conduct.[29] The contempt

fect *Re* Woolley, 11 Bush. 95, 110, citing People v. Freer, 1 Caines, 484. For fuller discussion see 20 Am L. Reg. 484.

18 Baker v. Gordon, 14 Cent. L. J., 237.

19 People v. Turner, 1 Cal. 154. See also to same effect, Resp. v. Oswald 1 Dall. 329.

20 Lining v. Bentham, 2 Bay (So. Car.) 1.

21 Charlton's Case, 2 Myl. & Cr. 316; Commonwealth v. Dandridge. 2 Va. Cases, 408. See 20 Am. L. Reg. 147.

22 4 Blk. 283.

23 Hummel's Case, 9 Watts. 521; Watson v. Citizen's Sav. Bank, 3 So. Car. 164.

24 Contempts in the presence of the court by violence, insulting language, etc., are sometimes termed criminal contempts. Andriscoggin, etc. R. Co. v. Andriscoggin R. Co., 49 Me. 400.

25 4 Blackst. Comm., 286; People v. Turner, 1 Cal. 155.

26 Ibid.

27 Desty's Crim. Law, sec. 73*a*; 10 Fed. Rep. 629, citing Stuart v. People, 4 Ill. 395, and People v. Wilson, 64 Ill. 195, the latter being the case of an abusive publication made in another city by an attorney.

28 Charlton's Case, 2 Myl. & Cr. 316.

29 People v. Turner, 1 Cal. 153.

toward the judge on the part of an attorney or party to a proceeding, may consist of abusive language,[30] uttered either in court,[31] or out of it;[32] contained in a letter addressed to the judge,[33] or in a petition signed by the party and filed with the clerk of the court,[34] or in printed publications.[35] But it is not a contempt of the court to which the document is presented to read an affidavit for a change of venue sought on account of prejudice in the mind of the judge.[36] The power to punish for contempt does not, however, as has been declared, arise from the mere exercise of judicial functions. Hence it is not possessed by a city recorder, in cases of contempt *in facie curiæ*;[37] nor by a commissioner in bankruptcy;[38] nor by a commisssoner appointed by Congress.[39] So a judge out of court can not punish as for a contempt a disobedience of an order made by him in a statutory proceeding, in the absence of express authority therefor.[40] Where a judge improperly makes a commitment for contempt, he is sometimes sued for false imprisonment. But the courts have not favored the civil liability of judges for adjudging a party in contempt, any more than for other judicial acts, for which they are not held liable in damages, even when the acts are in excess of their jurisdiction and are alleged to have been done corruptly and maliciously.[41] Yet there are cases where the judges may themselves be liable for contempt. Thus at common law there was a wide restraint exercised over inferior judges and magistrates, by proceedings for contempt, where these officers acted without jurisdiction or in disobedience to the authority or orders of higher courts.[42]

Not only any disrespect to the judge sitting in court, but any breach of order, decency or decorum by any one present, or any assault made in view of the court, is a contempt, and punishable summarily.[43] Violence or threats to a judge, justice or officer of a court, or to a juror, witness or party litigant, in respect of any act or proceeding in a court, is a contempt.[44] Among notable illustrations given of these propositions, is the instance where, after the judges had vacated the bench for a recess, defendant approached the Chief Justice, used abusive and vituperative language toward him, and made a violent assault on him.[45] So, according to recent surveys of the subject,[46] it is a flagrant contempt to call another a liar in the court room,[47] or to strike a defendant in the lobby of the court, after the trial is over,[48] or to threaten vengeance against the witnesses within the precincts of the court-room,[49] or to muster a body of militia so near a court as to disturb its deliberations.[50]

Again, contempt may be committed by infringing the immunity given to parties and

[30] Redman v. State, 28 Ind. 205.

[31] Lining v. Bentham, 2 Bay 1.

[32] Commonwealth v. Dandridge, 2 Va. Cas. 408. As by making speeches abusing the Lord Chief Justice of England, Reg. v. Onslow, 2 Cox Cr. C. 359; Tichborne Case, 370, 371.

[33] *Re* Pryor, 18 Kan. 72.

[34] Brown v. Brown, 4 Ind. 627.

[35] People v. Wilson, 64 Ill. 195; In the matter of Moore, 63 N. C. 397; *Ex parte* Greevy, 4 W. N. C. (Pa.) 308. See also *Ex parte* Biggs, 64 N. C. 202; *Ex parte* Simmons, 8 W. N. C. 296; 9 Id. 145; 20 Am. L. Reg, 83.

[36] *Ex parte* Curtis, 3 Minn. 374.

[37] Matter of Kerrigan, 33 N. J. 344.

[38] Rex v. Faulkner, 2 Mon. & Aye. Cases in bankruptcy 332, 339.

[39] *Ex* parte Dall, 7 Phila. 595.

[40] People v. Brennan, 45 Barb. 344. See also Hilton v. Patterson, 10 Abb. Pr. 245; 29 Am. L. Reg. 218, citing foregoing cases. If the order is made while sitting at chambers, it must first be made a rule of court. Ibid.

[41] Lining v. Bentham, 2 Bay (S. C.), 1; Picket v. Wallace, 7 Pac. C. L. J. 117. The latter case was decided by the California Supreme Court on Feb. 11, 1881, and relies on Bradley v. Fisher, 13 Wall. 335. But there are various remedies aside from impeachment against the abuse, by a judge of his power to punish for contempt. Thus if a judicial officer is about to exceed his jurisdiction by trying for a contempt without legal power to do so, the party threatened may stay the proceeding by prohibition; if he actually adjudges one guilty of contempt without jurisdiction, his judgment may be annulled by *certiorari*; and if the judgment imposes an imprisonment, the prisoner may be discharged on *habeas corpus*. Heurstal v. Muir, 7 Pac. C. L. J. 22, Cal. Supreme Ct., Oct. 19, 1880.

[42] 20 Am. L. Reg. 86, 87; People v. Judges, 2 Caines 97; Swift v. State, 63 Ind. 81; Pearson v. Pearson, 3 Scam. 489; People v. Turner, 1 Cal. 188; People v. Judges of Winchester, 2 Johns. Cas. 118; Conrow v. Schloss, 55 Pa. St. 28; People v. Judges of Washington Co., 2 Caines, 97; *Ex parte* Carnochan, Charlton (Ga.), 315; State v. Hunt, Coxe, 287; Patchin v. Mayor of Brooklyn, 13 Wend. 664; State v. Smith, 9 Iowa, 334.

[43] Desty's Cr. L., sec. 73a, and cases cited.

[44] Ibid.

[45] State v. Garland, 25 La. Ann. 532.

[46] 20 Am. L. Reg. 84; 10 Fed. Rep. 629.

[47] United States v. Emerson, 4 Cranch. C. C. 188.

[48] Rex v. Wigley, 32 E. C. L. Rep. 415.

[49] United States v. Carter, 3 Cr. C. C. 423. So, threatening the prosecutor of another person with danger of his life: Rex v. Carroll, 1 Wilson, 75.

[50] State v. Coulter, Wright, 421; State v. Goff, Id. 78.

witnesses in attendance on the court, from arrest and (according to the majority of the decisions) from service of process.[51] For it has long been a well settled rule of law that all persons who have any relation to a cause which calls for their attendance in court, and who attend in the course of that cause, though not compelled by process, are for the sake of public justice protected from arrest in coming to, attending upon and returning from the court.[52] In the case of a non-resident suitor or witness, the weight of authority is to the effect that the immunity is absolute from the service of any process, unless the case is exceptional.[53] The most recent application of these principles occurred under the following circumstances: A resident of New York went into Vermont for the sole purpose of testifying in a suit brought for his benefit, though instituted in the name of his attorney, and in which he was a material witness. Directly after leaving the court-room, the witness was served with a summons in an action begun by a party who was a defendant in the suit on trial. This new action, which sought damages for an alleged conspiracy, was based upon the same claim which had already been pleaded as a defense. It was held that the party so beginning this fresh action, was guilty of contempt, and should be committed unless he discontinued the suit.[54] Whether the service upon the witness was regarded as an act in violation of the order of the court, or as an act interfering with the administration of justice by the court, it was considered not essential in order to be a contempt, that it be done in the immediate presence of the court.[55]

Much of the discussion concerning contempt of court, has centered upon the extent of the right to publish comments and criticisms upon judicial proceedings. The entire subject has been thoroughly considered in recent instances where a contempt was ruled to have been committed by libellous publications assailing the integrity of a court; while the fact that an attorney who made such attacks was at the same time a newspaper editor, was held not to exempt him from liability.[56] It is not a contempt, however, for a publisher of a newspaper to print an advertisement offering a reward for documentary evidence of the use of a patented device prior to a certain date.[57] The refinements indulged by the courts in cases of this character, are illustrated by two recent English decisions. It was held not to be a contempt to reproduce in a newspaper an account of court proceedings by virtue of which a party was enjoined from publishing a certain cautionary advertisement, although the notice reprinted such advertisement in full, and thus practically evaded the injunction. This ruling was placed on the ground that the party had a right to announce that he was not at liberty to do a certain thing.[58] With more reason it was regarded as no contempt to advertise for subscriptions from the trade to prosecute an appeal in a suit brought for infringement of a patent for the process of nickel plating.[59]

More direct disregard of the authority of the court consists in positive disobedience to its orders, judgments and decrees. Thus to recur to instances previously noted, disobedience to a peremptory *mandamus* issued to an inferior officer or court, is a contempt.[60] But

[51] Blight v. Fisher, Peters, C. C. 41; Davis v. Sheeran, 1 Cranch. C. C. 287; United States v. Schofield, Id. 130; Cole v. Hawkins, Strange, 1094; Rex v. Hall, 2 Bl. 1110; *In re* Healy, 53 Vt. 694.

[52] Tidd's Prac. 196; 1 Greenl. Evid. secs. 316-318 and cases cited: *In re* Healy, 53 Vt. 694.

[53] Person v. Grier, 66 N. Y. 124; Norris v. Beach, 2 Johns. 294; Sanford v. Chase, 3 Cow. 381; Hopkins v. Coburn, 1 Wend. 292; Seaver v. Robinson, 3 Duer. 622; Merrill v. George, 23 How. Pr. 331; Halsey v. Stuart, 1 Southey, 366; Miles v. McCullough, 1 Binn. 77; Hall's Case, 1 Tyler, 274; Bridges v. Sheldon, Fed. Rep., May 31, 1881, p. 36; *In re* Healey, 53 Vt. 694. It is deemed as a contempt to serve process upon a witness, even by summons, if it is done in the immediate or constructive presence of the court upon which he is attending. 1 Greenl. Evid. sec. 316, and cases previously cited. See, also, Montague v. Harrison, 91 E. C. L. (3 C. B. N. S.) 291.

[54] *In re* Healey, 53 Vt. 694; S. C., 13 Reporter, 444.

[55] Ibid., referring to authorities previously cited; also to 11 East, 439; 1 Cranch. C. C. 287; Strange, 1094; 2 Bishop on Cr. Law, sec. 252.

[56] In the matter of Moore, 63 N. C. 397; *Ex parte* Biggs, 64 N. C. 202; *Ex parte* Greevy, 4 W. N. C. 308. *Contra*, *Ex parte* Steinman, 8 Id. 295; 9 Id. 145. See, also, on libel of grand jury, Storey v. People, 79 Ill. 45.

[57] Plating Co. v. Farquharson, L. R. 17 Ch. Div. 49, discrediting the old case of Pool v. Sacheverel, 1 P. Wms. 675, which had been quoted as holding that it is a contempt to advertise the offer of a reward for evidence to disprove a marriage which was under judicial consideration.

[58] Buenos Ayres Gas Co. v. Wilde, 42 L. T. (N. S.) 657, decided in Eng. Ch. Div., July 10, 1880.

[59] Plating Co. v. Farquharson, L. R. 17 Ch. Div. 49, reversing the ruling of Vice-Chancellor Bacon.

[60] *Ex parte* Carnochan, T. U. P. Charl. 315. See State v. Hunt, Coxe, 287; Patchin v. Mayor of Brooklyn, 13 Wend. 664; State v. Smith, 7 Iowa, 334; United States v. Lee Co., 9 Int. Rev. Rec. 25.

it is otherwise where the *mandamus* has been superseded by a writ of error.[61] So it has been lately ruled that the successor of an officer is not liable for contempt for refusing to obey a writ of *mandamus* issued to the former officer.[62] Still more recently it has been held, after thorough discussion, that an officer who has an unrestricted right of resignation, and exercises it in order to avoid obedience to a writ of *mandamus* requiring the levy of an unpopular tax, is not guilty of contempt.[63] The tax in question was designed to meet the interest on certain railroad bonds, and so aroused the antipathy of the public that a number of justices of the peace resigned rather than submit to be forced to impose it.[64]

One of the most important phases of contempt arises from the violation of injunctions. The scope of the restraining order or authority should, however, as has been seen, be shown to be clear and distinct,[65] and its disregard deliberate.[66] The suggestion that the operation of the injunction has been suspended by proceedings for rehearing or review has, however, been regarded as untenable when interposed to justify its violation.[67]

Among the notable instances of contempt of this nature, is disobedience, to a decree of distribution, on the part of an executor or administrator, as by refusing to pay over money to the distributees. This is a contempt, and proceedings to punish it as such may be invoked to enforce the decree.[68] So, a husband is chargeable with contempt for a refusal to pay alimony, temporary or permanent, in a divorce or maintenance suit,[69] and in such case an attachment may issue in the first instance.[70] But there is no such liability where the husband is unable to comply with the requirement, provided such disability has not been voluntarily created by him.[71] It is also a contempt to fail to deliver property to a receiver, when the court has ordered such delivery,[72] unless in insolvency or bankruptcy proceedings, where the title to the property is in dispute, and should first have been determined in an appropriate action[73] But in all cases the person charged must be a party to the proceedings,[74] which must still be pending,[75] and must have had due notice of the order disobeyed.[76]

It has even been recently ruled by the Master of the Rolls in England,[77] that an auctioneer is not guilty of contempt for continuing a sale under a distress after the receipt of a telegram announcing that the sale had been enjoined, which he believed to be a forgery.

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[61] United States v. Kendall, 5 Cranch. C. C. 285.

[62] *Ex parte* Tinkum, 54 Cal. 201.

[63] United States v. Justices of Lauderdale, 10 Fed. Rep. 560; S. C., 13 Rep. 422; 14 Cent. L. J. 210

[64] The opinion is interesting, and refers particularly to Huff v. Jasper County, 20 Am. L. Reg. (N. S.) 435.

[65] *In re* Carey, 10 Fed. Rep. 622. See German Sav. Bank v. Habel, 80 N. Y 273.

[66] Baker v. Gordon, 14 Cent. L. J. 237. *Contra*, Strobridge v. Lindsay, 11 Reporter, 734. So it has been held (Nov. 22, 1881) by the New York Court of Appeals, that there is no contempt where the injunction violated was given as a provisional remedy, and therefore became merged in the final judgment rendered in the action. Gardner v. Gardner, 12 Rep. 793.

[67] Merced Mfg. Co. v. Fremont, 7 Cal. 131; Ortman v. Dixon, 9 Cal. 23.

[68] *Ex parte* Smith, 53 Cal. 204; *Ex parte* Cohn, 55 Cal. 193. *Contra*, as to payment to widow, *Re* Leach, 51 Vt. 630. Compare *Ex parte* Wright, 65 Ind. 504.

[69] Ward v. Ward, 6 Abb. Prac. (N. S.) 79; *Ex parte* Perkins, 18 Cal. 60; Lyon v. Lyon, 21 Conn. 185; Galland v. Galland, 44 Cal. 475; Haines v. Haines, 35 Mich. 138.

[70] Kernoddle v. Cason, 25 Ind. 362; Ward v. Ward, 6 Abb. Prac. (N. S.) 79.

[71] Galland v. Galland, 44 Cal. 475.

[72] *Ex parte* Cohn, 5 Cal. 494; Tinkey v. Langdon, 60 How. Pr. 180.

[73] Matter of Hallis, 8 Pac. C. L. J. 307, Cal. Supreme Ct., Sept. 29, 1881; *In re* Marter, 12 N. B. R. 185, following Smith v. Mason, 14 Wall. 419, and Marshall v. Knox, 16 Id. 551.

[74] Matter of Hallis, just cited.

[75] *In re* Pryor, 18 Kan. 72, State v. Anderson, 40 Iowa. 207.

[76] *In re* Carey, 10 Fed. Rep. 622; *Ex parte* Cottrell, 8 Pac. C. L. J. 875, 991; Est. Barnes, 1 Civ. Pro. (N. Y.) 59. See Myers v. James, 3 Abb. Pr. 301.

[77] Tonkinson v. Cartledge, 22 Alb. L. J. 123.

EQUITABLE MORTGAGE BY DEPOSIT OF TITLE DEEDS—THE AMERICAN AND ENGLISH RULE.

An interesting and instructive article on this subject, carefully prepared, as far as the English law is involved, appeared in the CENTRAL LAW JOURNAL of June 2, reprinted from the *Irish Law Times*. It presents a full, clear and accurate view of the English law, but it does not discuss nor explain the decisions of the American courts on this important topic of the law, as it now exists in the jurisprudence of this country.

It is true that some of our most distinguished writers and jurists followed the decisions of the English Courts. Mr. Justice Story held: "Mortgages may not only be created by the express deeds and contracts of the parties, but they may also be implied in equity from the nature of the transactions between the parties, and then they are termed equitable mortgages. Thus, for instance, it is now settled in England (and some American States), that if the debtor deposits his title deeds to an estate with a creditor, as security for an antecedent debt, or upon a fresh loan of money, it is a valid agreement for a mortgage between the parties, and is not within the operation of the statute of frauds. This doctrine has sometimes been thought difficult to be maintained, either upon the ground of principle or public policy. And although it is firmly established, it has of late years been received with no small hesitation and disapprobation, and a disposition has been strongly evinced not to enlarge its operation." [1]

Chancellor Kent, with much learning and more explicitness, held the same views, and, after reviewing the decisions of the English courts, says: "But the decision in Russell v. Russell has withstood all subsequent assaults upon it, and the principle is now deemed established in the English law, that a mere deposit of title deeds, upon an advance of money, without a word passing, gives an equitable lien." [2] In the year 1820, the Supreme Court of the United States held the same views. Mr. Justice Story, delivering the opinion of the court, said: "It is argued that bills being *prima facie* evidence of an equivalent advance made by Prior, the possession by the latter of the articles of agreement, and the delivery to him of the accounts signed by Mandeville and Jameson, afford a legal presumption that the articles and account were delivered to him as security for a debt, which lien has always been deemed equivalent to an equitable mortgage. It may be admitted that, according to the course of the authorities in England, and as applicable to the state of land titles there, a deposit of title deeds does, in the cases alluded to, create a lien, which will be recognized as an equitable mortgage, and will entitle the party to call for an assignment of the property included in the title deeds." [3] The weight of the authority of Chancellor Kent and Mr. Justice Story, on all questions of jurisprudence is equal to any jurists, in England or America, and without disputing its force and accuracy, at the time they wrote, and when the opinion of the Supreme Court of the United States, in Mandeville v. Welch, was delivered, it is nevertheless true that the doctrine, as then held in England and the United States, has in the latter, undergone a decided change, though still held in some of the States, as it is understood and prevails in England.

In the United States the doctrine of the authorities adverse to the English view of the law on this subject is equally as weighty, and logically more impressive. "The doctrine of equitable mortgages arising upon the deposit of title deeds does not prevail generally in this country. It has, however, been adopted and distinctly acted upon in the case of Rockwell v. Hobby,[4] in New York. The assistant vice-chancellor there says: 'In the absence of all other proof of the evidence of an advance of money, and finding of title deeds of the borrower in the possession of the lender, is held to establish an equitable mortgage.' In South Carolina the doctrine also appears to be admitted as prevailing, though apparently in Kentucky, and clearly in Mississippi, it is rejected." [5] In Vermont, the question has been lately treated judicially, as an open one.[6] Some of the courts of this country have, however, held that an engagement in writing to give a mortgage, or a mortgage defectively executed, or any imperfect attempt to create a mortgage, or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien, which will have precedence of subsequent creditors. [7] Washburn says: "It was doubt-

[1] 2 Story Eq. Jur., sec. 1020.
[2] 4 Kent, 151.
[3] Mandeville v. Welch, 5 Wheat. 277.
[4] 2 Sand. Ch. 9 (1844).
[5] Welch v. Usher, 2 Hill's Ch. (S. C.) 166; Williams v. Stratton, 10 Sm. & Marsh. (Miss.) 418; Gothard v. Flynn, 25 Miss. 58; Van Meter v. McFaddin, 8 B. Mon. 435; Bowers v. Oyster, 3 Pa. 239; Shitz v. Diffenbach, 3 Barr. (Pa.) 233; Ricket v. Madeira, 1 Rawle, 325, 327.
[6] Bicknell v. Bicknell, 31 Vt. 498.
[7] Howe's Case, 1 Paige (N. Y.), 125; Bank of Muskingum v. Carpenter, 7 Ohio, 21; Lake v. Droud, 10 Ib. 415; Doe d. Burgess v. Bank of Cleveland, 3 McLean (C. C.), 140; Read v. Gaillard, 2 Desaus. (S.

ful, until within a recent period, whether this species of lien, or equitable mortgage, was, or would be, recognized by any of the courts of this country as valid." [8] This distinguished author treats the subject with great fairness and ability, and his views are clear and impressive, notwithstanding the difficulties that attend a decision on it, in the face of able authority on each side. He cites the case of Williams v. Stratton,[9] and remarks: "But though the deposit of title deeds will not be held to create a mortgage in Pennsylvania, still if it is accompanied by a written declaration, and an agreement to convey the land if the debt intended to be secured be not paid, and this is recorded in the proper registry of deeds, it will be treated as a mortgage. Indeed, it is not easy to see why such a doctrine should prevail in a country where the system of registration is universal, and where it must be carried out, if at all, in direct violation of the statute of frauds." [10]

The above wise and accurate view of Washburn deserves great consideration, on account of the conflict among distinguished jurists on this subject, and especially as it accords with the learned opinion of the Supreme Court of the United States, delivered as late as 1856, and may be considered as overruling the case of Mandeville v. Welch, decided in 1820. Mr. Justice Campbell, delivering the opinion of the court in the latest case before it, said: "Nor can the real property conveyed in the deed be retained as security for advances or debts subsequently made on the strength of a parol engagement. Such a contract would be avoided by the statute of frauds." [11]

We think the following remark of Lord Eldon, in *Ex parte* Hooper,[12] true, wise and applicable wherever the statute of frauds exists: "The doctrine of equitable mortgage by deposit of title deed has been too long established to be now disputed; but it may be said that it ought never to have been established. I am still more dissatisfied with the principle upon which I have acted of extending the original doctrine so far as to make the deposit a security for subsequent advances. At all events, the doctrine is not to be enlarged." The only criticism we would offer on the above remark of Lord Eldon's is, that he yielded to authority in preference to principle, truth and reason, when he saw that the authority to which he gave his adhesion as a judge was wrong, and acknowledged it.

Washburn agrees with Browne; and after opposing the soundness of this doctrine so uniformly sustained in England, says: "But it has been recognized in several of the States as being in force. The power of creating a lien by deposit and pledge of a title deed, seem to be recognized, though not applied, in Maine; and the same may be said of the court in Mississippi, though an intimation is made that a lien in the nature of an equitable mortgage may be valid under their statute of frauds for the term of one year. In Georgia, New Jersey and South Carolina, the power to create such a lien is recognized, and is expressly sustained in New York, though it is remarked by Comstock, J., 'We have no practice of creating liens in this manner;' and in Rhode Island. The same is true of Wisconsin and Illinois. The law is stated as doubtful in Vermont. This is called an equitable mortgage, but it is of little consequence in this country, owing to the difficulty of affecting another claimant with notice of such deposit." [13]

The American edition of Adams' Equity cites also the cases referred to by Washburn and Browne, but takes no position on the point under discussion.[14] Bispham on "Principles of Equity," an American work of merit and authority, published in 1878, remarks, writing on the subject we are now discussing: "The first case in England in which this doctrine seems to have been authoritatively settled, was Russell v. Russell, decided by Lord Thurlow in 1783, and this decision, though strongly disapproved, has nevertheless been recognized by many cases as binding authority; and the doctrine may, therefore, be considered as well established, in spite of its apparent infringement upon the Statute of Frauds. Mortgages by deposit of

C.) 552. See Browne on the Statute of Frauds, 61, from which the above authorities are taken.

[8] 2 Washb. on Real Property, 84.

[9] 10 Sm. & M., 418.

[10] 2 Washb. on Real Prop., 84.

[11] Williams v. Hill, 19 How. 246.

[12] 1 Meri. Ch., 7, cited by Mr. Justice Campbell in the case above referred to.

[13] 2 Washb. on Real Property, 84-85. See, also, Walker's American Law, 356, to which Washburn refers, and the cases cited by Washburn are also cited by Browne.

[14] Adams' Eq. 314, 4th American edition. By Henry Wharton.

title deeds have been sustained in several States of the Union, although they have not been of frequent occurrence. They have been disapproved in Kentucky, and rejected in Pennsylvania and Ohio; in Vermont the question is undecided; in quite a number of cases agreements to give a mortgage have been held to create a lien.[15] Hare and Wallace, American annotators of Leading Cases in Equity, after presenting a few cases in which it has been held to be in violation of the Statute of Frauds, give also other cases in which it has been held otherwise in the United States.[16] It has been held recently in New Jersey, that an equitable mortgage may arise from a deposit of title deeds, citing as authority from that State, Griffin v. Griffin,[17] and Brewer v. Marshall,[18] and referring also to Leading Cases in Equity, the same edition referred to *supra*.

Very serious objections to the English decisions on this subject have been expressed by the courts of England, yet, notwithstanding the force of these objections, the decisions are uniform in sustaining the law in favor of the equitable mortgage. It is different in the United States, where the law is in a confused, unsettled and unsatisfactory state, as far as the weight of authority of our writers on the subject, and also decisions of our highest courts go in settling this question, the Supreme Courts of the different States presenting great contrariety of views, as we have demonstrated in this article. In a logical, as well as practical sense, we think there can be but little difficulty, notwithstanding the eminent authorities against the view, in following the decisions of those States where, under the Statute of Frauds, all such deposits of legal title deeds, with only a verbal understanding, have been held illegal, and of no force or effect. The weight of authorities, with their unanswerable reasons assigned, is sufficient to sustain the views of those courts following the English decisions, fortified in this country by the position of Story and Kent, from whom it may be embarrassing to dissent.

15 Bispham's Principles of Equity, 414-415; 13 Leading Cases in Eq., H & W. American edition, pp. 663-6.

16 Gale v. Morris, 29 N. J. (Eq.)222. The same case fully noticed in 7 Cent. L. J. 314, decided in 1877.

17 3. C. E. Green, 104.

18 4 C. E. Green, 537.

We refer again to the decision of the Supreme Court of the United States in the case of Williams v. Hill,[19] reversing unanimously its former decision, The reasoning of Campbell, J., by whom the opinion of the court was delivered, is unanswerable. We also refer to the clear and unanswerable views of Washburn and Browne, cited *supra*, as being the most logical, accurate and just, equal to any commentators on the other side, and sustained by the more enlarged and liberal views of the learned jurists of those State courts with which they are in conformity, and agreeing most conclusively with the literal meaning of the Statute of Frauds on this subject, as it exists in probably every State in the Union.

We need not present to the Bar or Bench the Statute of Frauds, nor its history, as it arose in England under 29 Car. II., amended by 9 Geo. IV., the substance and leading features of which we believe have been adopted in nearly all, if not every State in the Union.[20] In examining these statutes as presented in the appendix to Browne's work on the Statute of Frauds, it is difficult to maintain an equitable mortgage on verbal agreement, in the face of statutes which, in express language, reject and forbid all verbal agreements of such character as would attempt to bind an interest in lands as could be embraced in mortgages which would create a title to said lands; the exceptions applying and designed only to apply to rents for, or within a specified time. A court of equity may decide differently from a court of law on principles of equity; or may give an equitable construction to a statute; yet it can not create an equity in the face of a statute, and against its provisions; for in a statutory sense, as in equity, *equitas sequitur legem*. It seems to be equivalent to creating an equitable estate, or rights in opposition to the Statute of Frauds, to say that an equitable mortgage can exist, or be brought into existence by the order of a court, when it rests on no other foundation but a verbal agreement.

The deeds are evidence of one title, and only one as expressed on their face; the possession of those deeds by another can not, nor ought it to create a new and different in-

19 19 How. 246.

20 *Vide* Browne's Statute of Frauds, Appendix with a list of the States having this statute, and the statutes.

terest in opposition to a statute law which requires a written instrument executed according to law to convey, or create any title in lands subject to its exceptions, in positive terms and unequivocal language.

WM. ARCHER COCKE.

INSURABLE INTEREST — GRAIN IN AN ELEVATOR.

BAXTER v. HARTFORD FIRE INS. CO.

United States Circuit Court, District of Indiana, June 24, 1882.

The owners of an elevator have an insurable interest in grain stored therein by their customers, to whom they undertake to return not the identical grain but grain of the same grade when called for, although the receipt given for it specified that it was "wheat in store subject to our charges. Fire at owner's risk."

GRESHAM, District Judge, delivered the opinion of the court:

This is a suit on a fire policy issued by the defendant to the plaintiffs, "on grain, seeds and sacks, their own, or held by them in trust or on commission, or sold but not delivered," contained in their elevator at Rochester, Indiana. The elevator and its contents were destroyed by fire.

As to 2238 bushels of wheat in the elevator at the time of the fire, it is averred in the third paragraph of the answer, that this wheat was delivered to the plaintiffs by farmers, after the insurance was taken, every one of whom, at the time of such delivery, received and accepted from the plaintiffs a written instrument or contract specifying and describing the amount and character of wheat by him delivered, and concluding as follows: "Wheat in store subject to our charges. Fire at owner's risk."

It is also averred that it was not the intention of those depositing the wheat, or the plaintiffs, that it should be covered by the policy sued on, and that, at the time of the fire, the plaintiffs had in the elevator wheat of their own. These facts are pleaded against a recovery for more than the plaintiff's lien for charges, on the 2238 bushels of wheat. The plaintiffs demur to the third paragraph of the answer.

It is urged by the defendants counsel, that the wheat described in the paragraph demurred to was held on deposit, under an agreement between the depositors and the plaintiffs that it was not to be insured, and that therefore the plaintiffs, who were bailees, had no authority to put it under their policy and charge the depositors, who were bailors, for insurance.

The plaintiffs were commission merchants, engaged in buying and selling grain, and in connection with their business they owned and operated an elevator in the usual way. Those who deposited wheat in this elevator took receipts for the same, knowing that it could never be distinguished from the mass with which it was mingled, and that the plaintiffs could and would sell and ship it as their own in the course of their business. It was not claimed that this 2,238 bushels of wheat was to be kept separate from other wheat in the elevator of the same grade. The title to this and other wheat deposited in the elevator as it was, remained in the depositors, or it passed into the plaintiffs.

The contract between the plaintiffs and depositors was, not that the latter should on demand receive the identical wheat stored in the elevator, but that the plaintiffs should deliver wheat equal in amount and grade to that deposited, or account for its value. Being authorized to sell the wheat on their own account as fast as it was deposited in the elevator, I think the plaintiffs had such an interest in it as authorized them to insure it for its full value. They were under no obligation to restore the identical wheat stored in their elevator, and no one expected them to do so. Carlisle v. Wallace, 12 Ind. 252; Johnson v. Brown, 37 Iowa, 200.

But on the theory that the title to the wheat described in the paragraph demurred to remained in the depositors, and that they took the risk of loss by fire under their contracts with the plaintiffs, still the latter were liable for its value if fire should result from carelessness on the part of their employees, and they had a right to protect themselves against this liability by insuring the wheat for its full value. And, further, if this wheat remained the property of the bailors, there was nothing in their contracts with the plaintiffs which prohibited them as bailees from insuring it for its full value. The defendant was not a party to the agreement. It is true, there is an averment in the paragraph demurred to that it was not the intention of the depositors or the plaintiffs that the wheat should be covered by the policy sued on, but that is only the pleader's construction of the instruments or contracts which the depositors received from the plaintiffs.

Demurrer sustained.

SALE OF CHATTELS — PASSING OF TITLE — INNOCENT PURCHASER FOR VALUE.

HAMET v. LETCHER.

Supreme Court of Ohio.

H, the owner of chattels, relying on the representations of R that he was the agent of L, agreed to sell the same to L on credit, and H, in the belief that R was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L, as he well knew. *Held*, that the

property in the chattels did not pass from H, and that L, who bought the chattels of R and converted them to his own use, without knowledge of the fraud, was liable to H for their value; and the fact that R, at the time the chattels were delivered to him, paid H part of the price agreed on, will make no difference, except as to the amount recovered against L.

Error to the District Court of Williams County.

In 1874, O. T. Letcher & Co. were engaged at Bryan, Williams County, in buying and shipping hogs. Geo. W. Hamet, a farmer residing in that county, had a lot of hogs for sale. On October 16 of that year, Jacob J. Rohner, representing himself to be the agent of O. T. Letcher & Co., bought the hogs of Hamet for $173.25, which was a fair price for the same, paying to him on the purchase $55. Hamet knew Letcher & Co. to be responsible, and would not let Rohner have the hogs on his own account. He believed Rohner's representation that he was such agent, and relied on the representation. In fact, Rohner was not the agent of Letcher & Co., nor had he any authority to purchase hogs on their account. Rohner, receiving the hogs under such circumstances from Hamet, drove them to Bryan, where he sold them, as his own hogs, to O. T. Letcher & Co., who were ignorant of the fraud by which they were obtained. Believing that Rohner was the owner, the firm received the hogs, paying him full value for the same. Shortly thereafter Hamet demanded of the firm payment for the hogs, but payment was refused, and thereupon he brought suit against the firm, in the Court of Common Pleas of Williams County, to recover the value of the property. In that court it was held that, on the facts stated, Hamet was not entitled to recover; the district court affirmed the judgment, and Hamet, on leave, filed in this court a petition in error to reverse both the judgments.

Pratt & Bentley and *Sheldon & Boothman*, for plaintiff in error: *J. Pillars* and *S. E. Blakeslee*, for defendants in error.

OKEY, C. J., delivered the opinion of the court:

A remark made in Cundy v. Lindsay, 3 App. Cas. 459, is quite applicable here. There it was said, "You have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practiced upon both of them must fall." But our duty in this case, as in all others, is simply to declare the law. The only question here is whether, in view of the facts set forth in the statement of the case, the property in the hogs passed from Hamet. If it did, the judgments in the courts below are right; if it did not, they are wrong. In the decision of cases of this sort, difficult questions are sometimes presented, but the principles upon which they should be determined are firmly established.

If Rohner had offered to buy the hogs for himself, and Hamet had agreed to sell them to him, and had made a delivery thereof in pursuance of such sale, the property in the hogs would have passed to Rohner, although the sale had been induced solely by fraudulent representations made by Rohner. That would have been a *de facto* contract; and while it might have been avoided by Hamet, by reason of the fraud, while the property remained in the possession of Rohner, yet if Rohner had sold the hogs, before the contract was thus avoided, to Letcher & Co., they having no knowledge of the fraud, the latter would have acquired a perfect title. Rowley v. Bigelow, 12 Pick. 397; Hoffman v. Noble, 6 Met. 68; Schaeffer v. Macqueen, 1 Disney, 453; Attenborough v. Dock Co., 3 C. P. D. 450; Babcock v. Lawson, 4 Q. B. D. 394: affirmed, 5 Q. B. D. 284. In a case where this principle was enforced (Moyes v. Newington, 4 Q. B. D. 32), Cockburn, C. J., said: "The reasoning on which this conclusion is based, may not appear altogether consistent with principle, but, agreeing in the result, we should prefer to adopt the view of the American courts, as stated in the case of Root v. French, 13 Wend. 570, a case decided in the Supreme Court of Judicature of the State of New York, according to which the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the principle of equity that where one or two innocent parties must suffer from the fraud of a third, the loss should fall on him who enabled such third party to commit the fraud."

But this was not a sale to Rohner in his own right. He made no proposition to buy in any other way than as agent. Hamet did not agree to sell to any other than Letcher & Co., who never agreed to buy of him, and he was induced to sell solely by reason of Rohner's representation that he was such agent, which representation was wholly false, as Rohner well knew. This, therefore, was not a contract voidable merely, but an agreement wholly void: and, under the circumstances, the property in the hogs never passed from Hamet. Hence, applying the maxim that no one can transfer a greater right or better title than he himself possesses (Roland v. Gundy, 5 Ohio, 202), it necessarily follows that Letcher & Co. are liable for a conversion. Moody v. Blake, 117 Mass. 23; Barker v. Dinsmore, 72 Pa. St. 427; Saltus v. Everett, 20 Wend. 267; Fawcett v. Osborn, 32 Ill. 411; Hardman v. Booth, 1 H. & C. 803; Higgons v. Burton, 26 L. J. Ex. (N. S.) 342; Kingsford v. Merry, 1 H. & N. 503; Hollins v. Fowler, L. R. 7 Q. B. 616; affirmed, L. R. 7 App. 757; *In re* Reed, 3 Ch. D. 123; Lickbarrow v. Mason, 1 Smith's L. C. 2 pt. 1195; Cundy v. Lindsay, *supra*.

Perhaps the principle here involved was more fully considered in the latter case (Cundy v. Lindsay) than in any other. The facts briefly stated were as follows: Lindsay & Co. were manufacturers of linen goods at Belfast, Ireland. Alfred Blenkarn, who occupied a room in a house looking into Wood street, Cheapside, wrote to Lindsay & Co., proposing to purchase a certain quan-

tity of goods, and in his letter used this address, "37 Wood street, Cheapside," and signed the letter (without any initial for a Christian name) with a name so written that it appeared to be "Blenkiron & Co." There was a respectable firm known to Lindsay & Co. of the name of "W. Blenkiron & Co.," carrying on business at 123 Wood street. Lindsay & Co. sent letters, and afterwards supplied goods, being all addressed "Messrs. Blenkiron & Co., 37 Wood street," which they supposed was the address of the respectable firm above mentioned. The goods were received by Alfred Blenkarn at that place, of which goods he sold 250 dozen of Cambric handkerchiefs to the Messry Cundy, who had no knowledge of the fraud, and who resold them in the ordinary course of their trade.

On the hearing of the case before the judges of the Queen's Bench (Lindsay v. Cundy, 1 Q. B. D. 348), in 1876. it was held that the property in the goods passed to Blenkarn, and eonsequently that Lindsay & Co. could not maintain an action against the Messrs. Cundy, innocent purchasers. But that decision was reversed the next year, in the court of appeals (Lindsay v. Cundy, 2 Q. B. D. 96), and the latter decision was affirmed in the House of Lords in 1878. Cundy v. Lindsay, *supra*. That was a stronger case for the innocent purchaser than this case. Indeed, on the latter hearing, Mr. Benjamin, who argued the case for Messrs. Cundy, admitted that under circumstances such as are presented in this case, the property would not pass to the fraudulent vendee.

The circumstance that Hamet intended that Letcher and Co. should have the hogs is of no importance. He never intended they should acquire title from any other than himself, nor do they make any claim to such property under any purchase they made from him. The case would be in no material respect different if Rohner had represented to Hamet that he was agent of some firm other than Letcher & Co. Nor does the payment by Rohner of $55 on the agreed price have any other effect on the right to recover than to reduce the amount for which judgment should be rendered.

Counsel for defendants in error rely on Stoddard v. Ham, 129 Mass. 383, the syllabus of which is as follows: "If A sells goods to B, who sells them to C, the fact that A supposed he was selling the goods to C through B as his agent, and would not have sold them to B on his sole credit, would not entitle A to maintain an action against C for a conversion of the goods." But the decision lends no support to the defendants in error. There it appeared that Stoddard & Co., the plaintiffs, had sold bricks to Leonard, believing that he was acting as agent for Ham, the defendant; but Leonard was acting for himself, and subsequently he sold the bricks to Ham. It was expressly found as a fact that "Leonard was not guilty of any false representations as to agency, and it was a case of error and mistake on the part of the plaintiffs as to the principal with whom they were dealing." Of course, Stoddard & Co. failed in the action.

Defendants in error also rely on a remark of McIlvaine, J., delivering the opinion in Dean v. Yates, 22 Ohio St. 388, as to the effect of delivery of possession to a fraudulent vendee. But nothing was determined in that case inconsistent with the conclusion stated in this case. On the contrary, Dean v. Yates is entirely consistent with our decision of this case, and supports it, as it is likewise supported by Sanders v. Keber, 28 Ohio St. 660, also cited by defendants in error.

In the finding of facts in the Court of Common Pleas, it was ascertained that, if Hamet was entitled to recover, the amount then (June 11, 1877) due to him, deducting the sum paid by Rohner, was $117.28. The judgment of the district court and court of common pleas will be reversed, and judgment will be rendered in favor of Hamet and against the defendants in error for that sum, with interest from June 11, 1877, and costs.

Judgment reversed.

FRAUDULENT DEED — BONA FIDE PURCHASER—POSSESSION—NOTICE.

McNEIL v. JORDAN.

Supreme Court of Kansas, June Term, 1882.

1. Where a person holds the position of a *bona fide* purchaser of real estate for a valuable consideration without notice of the original owner's equities, he will not be deprived of his title by proof of fraud practiced by his grantee upon the person executing to such grantee the conveyance thereof.

2. Where a person who is the owner of, and in actual possession of real estate, desires to convey it to her mother, and employs an attorney at law to prepare a deed therefor, and after the deed is drafted by him she examines and finds it written out in accordance with her directions, and then, at the attorney's request, accompanies him to the office of a notary public to execute it, and at the office the attorney, without her knowledge, fraudulently produces in the place of the deed already examined another deed containing his own name as the grantee therein, and the owner, supposing the deed so produced to be the identical one she had previously looked over, without examination of its contents, affixes her signature thereto in the presence of the notary and acknowledges its execution, and then delivers it to the attorney to be deposited by him for record, and the deed is filed by him for record in the office of the registrar of deeds of the proper county, and thereafter the attorney conveys the premises to innocent persons for value, the owner of the premises so executing the deed is estopped from denying its validity, so as to affect the rights of the subsequent *bona fide* grantees.

3. While it is the general rule that open, notorious, unequivocal and exclusive possession of real estate under an apparent claim of ownership is notice to the world of whatever claim the possessor asserts, whether such claim be legal or equitable in its nature, yet

this rule does not apply to a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved an interest in the land conveyed. Such grantor, though in actual possession, is deemed to hold the same for a temporary purpose without claim of right, and merely as a tenant at sufferance of the grantee.

4. A grantor is not deemed in law to have adverse possession against his grantee or those deriving title from him.

Error from Cowley County.

Messrs. Hackney & McDonald, for plaintiffs in error; *A. L. Williams*, for defendant in error.

Lena McNeil, the plaintiff in error and plaintiff below, about January 26, 1880, desiring to convey certain real estate situate in the City of Winfield, Cowley County, Kansas, to her mother, one Martha E. McNeil, went to the office of one Charles H. Payson, a lawyer at Winfield, Kansas, and requested him to draw up a deed for that purpose. She afterwards went to Payson's office, when he showed and read to her a deed ready for her signature and acknowledgment, drawn up in accordance with her directions. She stated that it was satisfactory, and, at the request of Payson, she accompanied him to the office of a notary public to sign and have it acknowledged. Upon reaching the office Payson, without her knowledge, substituted another deed for the one previously read to her, which conveyed the property to himself, and she, in ignorance of the substitution, and without examination of the deed, signed and acknowledged the same and left it in the possession of Payson for record, and it was by him duly deposited for record in the office of the register of deeds for Cowley County, Kansas, on the following day, and thereafter duly recorded. The next day Payson executed a mortgage on the property to James Jordan to secure a loan of $480, and on the 2nd day of February, 1880, deeded the property to George H. Buckman for $200, Buckman assuming the mortgage. On the 23d day of February, 1880, plaintiff in error discovered that the deed she had executed conveyed her real estate to Payson, the lawyer, instead of to Martha E. McNeil, her mother, and immediately brought suit setting forth the foregoing facts, and alleging actual, open and exclusive possession of the premises all the time, and asking that the deed from her to Payson, and also the deed from Payson to Buckman, and the mortgage from Payson to Jordan be cancelled and declared null and void. To this petition, Jordan and Buckman made answer, alleging innocence of any knowledge of the fraud of Payson; that they had made careful examinations of the records before consummating their transactions with Payson; that their transactions with Payson were in good faith and for sufficient consideration, and setting forth the details thereof. Upon the trial, judgment was rendered against the plaintiff in error, and in favor of the defendants in error, and the plaintiff brings the case to this court.

HORTON, C.J., delivered the opinion of the court:

The principal questions involved in this controversy are, Was the deed obtained by Charles H. Payson from Lena McNeil absolutely void? Second, if not void, but voidable only, was the actual possession of the premises by Lena McNeil notice to the defendants of the fraudulent title of their grantors? If the deed to Jordan was absolutely void, then it was and is an absolute nullity, and nothing can be founded upon it. It can not be made the basis of any title. On the other hand, if voidable only, it passed an estate of which Payson became legally seized, defeasible in his hands, but not in the hands of innocent, *bona fide* purchasers under him. On the part of the plaintiff, it is contended that the deed was, and is, absolutely void, because, in fact, it was a deed to another grantee than the person intended, and, therefore, that there was no assent of the mind of the grantor to the creation of the instrument to which her signature was fraudulently obtained, and hence that the writing was not her act. To sustain this position counsel cite the fraudulent procurement of a deed deposited as an escrow from the depositary by the grantee. Evarts v. Agnes, 4 Wis. 343, and 6 Wis. 453; the furtively purloining, without the knowledge or consent of the maker, of a note and mortgage deposited in escrow (Andrews v. Thayer, 30 Wis. 228); and the cases of deeds obtained by larceny and like means. Bishop on Contracts, secs. 190, 191; Tisher v. Beckwith, 30 Wis. 55; Burton v. Boyd, 7 Kan. 31, and Ayer v. Probasco, 14 Kan. 196, are also referred to.

The principle announced in the various decisions presented to us by the counsel for the plaintiff is not applicable here. The question of the assent of the grantor need not be considered now. In this case, it appears from the findings of the court that, on the 26th day of January, 1880, Lena McNeil, at the request of Payson, accompanied him to the office of a notary public, and, upon reaching the office, signed her name to the deed in the presence of the notary without any examination, and then acknowledged its execution and delivered it to Payson to be filed for record. He deposited the deed for record on the next day at 11:30 o'clock A. M., and it was thereupon recorded in the book of deeds in the office of the register. The conduct of the grantor of this deed was such as to forbid her to deny its validity so as to affect the rights of persons holding the position of *bona fide* purchasers of the premises for value. Where parties are inattentive and careless in the execution of conveyances of real estate, the law estops them from setting up title as against a *bona fide* purchaser for value under such conveyance. As was said in Somes v. Brewer, 2 Pick. 184, cited upon the former hearing of this case (Jordan v. McNeil, 25 Kan. 459): "It is a general and just rule, that when a loss had happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but

more especially if there has been any carelessness on his part which caused or contributed to the misfortune. A man can scarcely be cheated out of his property, especially of real estate, in such manner as to give an innocent purchaser a right to hold according to the principles which have been mentioned, without a degree of negligence on his part which should remove all ground of complaint. Suppose him to be prevailed upon by fraudulent representations to execute a deed without asking advice of friends or counsel, he has *locus penitentiæ* when he goes before a magistrate to acknowledge it."

Counsel claim that as the grantor employed a lawyer to draft for her the deed which she intended to execute, and as she examined the contents of it on its first presentation to her, and found it drafted according to her wishes, she had the right to rely implicitly upon the integrity of the lawyer, and sign the conveyance produced in the office of the notary by him, without question or examination; and that she exercised due caution in examining the deed when first presented; that any further examination was unnecessary. The lawyer who prepared the deed for her was acting as her agent, and she confided in him. If she chose to rely upon his statements and thereby received injury, she must suffer the consequences of her misplaced confidence rather than an innocent third person. Where a person not illiterate or of feeble mind, possessed of legal capacity to make a contract, executes and acknowledges a deed without ascertaining its character and extent, upon the representations of another, he puts confidence in that person, and if injury ensues to an innocent third person by reason of that confidence, his act is the means of that injury and he ought to answer to it. Chapman v. Rose, 56 N. Y. 137. Here, it appears that the grantor unwittingly fell into the hands of a dishonorable and dishonest lawyer (*In re* Payson, 23 Kan. 757), and trusted to his integrity. But he betrayed that trust and wrongfully obtained the signature and acknowledgment of the grantor to the deed conveying the property to himself. This deed was afterwards recorded, and the consequences thereof must fall upon the grantor of the fraudulent deed, rather than upon those who have paid their money upon the faith of the conveyance. The deed, therefore, in our opinion, was not and is not a nullity. It was effectual to pass the estate, so that the deed and the mortgage from the fraudulent grantee to defendants, if they may be regarded as *bona fide* purchasers, were valid. Bloomer v. Henderson, 8 Mich. 405; Burson v. Huntington, 21 Mich. 415; Douglas v. Matting, 29 Ia. 498; Putnam v. Sullivan, 3 Mass. 45; Bishop on Contracts, sec. 169; Cook v. Moore, 39 Tex. 255; Deputy v. Staplefordd, 19 Cal. 302.

This brings us to the consideration of the possession of the premises by Lena McNeil at the dates of the execution of the mortgage and subsequent conveyance. Were the defendants notified by such possession of the fraud of their grantor? Were the defendants bound to inquire of Lena McNeil what interest she claimed or represented? We have time and again stated that open, notorious, unequivocal and exclusive possession of real estate under an apparent claim of ownership is notice to the world of whatever claim the possessor asserts, whether such claim be legal or equitable in its nature. Johnson v. Clark, 18 Kan. 164; School District v. Taylor, 19 Kan. 292; Tucker v. Vandermark, 21 Kan. 263. This rule, however, does not, in the nature of things, apply to a vendor remaining in possession. A purchaser from the grantee of the party in possession need not inquire whether such party has reserved any interest in the land conveyed. So far as the purchaser is concerned, the actual occupant's deed is conclusive upon that point. The object of the law in holding possession constructive notice, is to protect the possessor from the acts of others who do not derive their title from him, not to protect him against his own acts; not to protect him against his own deed. Therefore, where a grantor executes and delivers a deed of conveyance and directs the deed to go upon record, he says to the world, "Though I am yet in the possession of the premises conveyed, it is for a temporary purpose without claim of right, and merely as a tenant at sufferance of my grantee." The great weight of the authorities supports this conclusion.

Thus Wade on Notice says: "So the possessor may by his own act, in putting upon the record an instrument inconsistent with title in himself, or by executing and delivering such a recordable instrument, be estopped from relying upon his possession as evidence to subsequent purchasers, that he claims title to the premises. In the case cited, defendant had conveyed the land in question to one in whom he placed confidence, subject to a secret trust. The deed of conveyance was absolute on its face, and was duly recorded. Relying upon the record, plaintiff purchased the premises from the apparent grantee for value, who, in making the sale, was guilty of a breach of trust. But the plaintiff took without knowledge or notice of the trust, although the defendant, after making the conveyance, remained in possession and openly exercised acts of ownership over the property." Sec. 299.

Bigelow on Fraud states: "The rule of notice by possession does not apply in favor of a vendor remaining in possession, so as to require a purchaser from his grantee to inquire whether he has reserved any interest in the land conveyed. So far as the purchaser is concerned, the vendor's deed is conclusive. Having declared by his deed that he makes no reservation, he can not afterwards set up any secret arrangement by which his grant is impaired." Page 295-6.

Washburn on Real Property, also says: "Nor will the continued possession by the grantor of land, after the making of his deed, be notice of a defeasance held by him, which is not recorded." Page 66, vol. 2, 3d ed.

The following decisions are in accord with these elementary writers: Van Keuren v. Central R. Co.. 9 Vroom, (38 N. J. L.) 165; Newhall v. Pierce, 5 Pick. 450; New York Life Ins. Co. v. Cutler, 3 Sandf. Ch. 175; Kunkle v. Wolfersberger, 6 Watts, 126; Hennesey v. Andrews, 5 Cush. 170; Crossen v. Swoveland, 22 Ind. 434; Scott v. Gallagher, 14 S. & R. 333; 2 Lead. Cas. in Eq., pt. 1, p. 118; Juvenal v. Patterson, 10 Pa. St. 203. See also 4 Cent. L. J. 122, 124; Bloomer v. Henderson, *supra;* Deputy v. Stapleford, *supra*; Cook v. Moore, *supra*.

In this case, as the defendants had no knowledge of the fraud practiced upon the plaintiff by their grantor, and as they examined the records of the office of the register of deeds of Cowley County and found recorded there the title in fee simple in Payson before they took their conveyances from him or paid out their money, and as in all matters connected with their transactions they acted in good faith, they can not be regarded as other than holding the position of *bona fide* purchaser, and the possession of the land by the grantor of their grantee was, at the most, constructive notice to them that she was a tenant at sufferance of her grantee.

Counsel for plaintiff make the further claim that plaintiff held the premises by an adverse possession at the time of the execution of the mortgage and conveyance to defendant, and therefore that Payson could not convey the land. The conclusion already obtained justifies us in saying that the grantor of Payson did not have in law adverse possession as to *bona fide* purchasers after the execution and recording of her deed. Both the innocent mortgagee and the *bona fide* purchaser had the right to treat her merely as a tenant at sufferance of her grantee at the execution of the conveyance to themselves.

The judgment of the district court will be affirmed.

CORPORATION — RECOGNITION OF CORPORATE EXISTENCE—PRIMA FACIE EVIDENCE.

SANDWICH MFG. CO. v. DONAHUE.

Supreme Court of Minnesota, April 29, 1882.

1. The recognition by a party of an association as a corporation is *prima facie* evidence in a controversy between such party and such association of its corporate existence.

2. An association and an individual having entered upon partnership relations with each other may recover upon obligations made to them jointly irrespective of their rights and duties *inter sese* or the power of such association to contract partnership relations.

3. The objection to the joining of the association by its company name merely can not be urged after pleading to the merits and going to trial.

Appeal from order of District Court, County of Sibley.

G. D. Emery, for appellants; *S. & O. Kipp*, for respondent.

VANDERBURGH, J., delivered the opinion of the court:

This action was brought upon defendant's contract of guaranty of certain notes made to the Adams & French Harvester Company in its partnership name, and dated July 30, 1878. The answer denies plaintiffs' allegations of partnership and the corporate existence of the Sandwich Manufacturing Company—one of plaintiffs. It admits the due execution of said guaranty, and sets up as affirmative defense an accounting and settlement of the matters in suit between the defendant and the Adams & French Harvester Company. Upon the trial in the district court the plaintiffs offered in evidence a certified copy of the articles of incorporation of the Sandwich Manufacturing Company, purporting to be in pursuance of the general law of Illinois. The evidence was properly rejected by the court, because not accompanied with proof of the enabling statute, and as not properly certified and authenticated so as to be admissible either under the laws of this State or the act of Congress. U. S. Rev. Stat., sec. 906.

Thereupon the plaintiffs introduced certain evidence tending to show a recognition or admission of the corporate existence of the last named company by defendant in his dealings with it, and in receipting and accounting for its property, in connection with a deposition of one Adams, who testified that he was the secretary and treasurer of said company, and that during all the time in question the plaintiffs were partners under said firm name as alleged. It also appeared in evidence that the defendant had business relations with the Adams & French Company, of which the Sandwich Company was thus shown to be a member, and that he executed the contract of guaranty of payment of said several notes in question upon the sale of plaintiffs' machinery made by him to the maker of said notes, and in pursuance of an agreement entered into between himself and said Harvester Company, on the faith of which said machinery had been entrusted to his agency. The case was dismissed by the court for insufficiency of evidence of the alleged corporation and partnership. We think it should have been sent to the jury.

The current of authority is that corporate existence and character may be proved, *prima facie* at least, by the recognition and admission of parties contracting and dealing with an alleged corporation. Morawetz on Corp., sec. 138; Topping v. Bickford, 4 Allen. 120. The distinction between such cases and those in which strict proof of charter authority and organization is required, especially where the right to exercise certain special rights and privileges is claimed, is well stated in Chapman v. Colby (Mich.), 10 N. W. Rep. 75. But if in this case it be conceded that the evidence was insufficient to establish presumptively the ex-

stence of the Sandwich Company as a corporation, there is nothing to rebut the presumption that it has a legal existence as an association or partnership. The defendant has obligated himself to whomsoever the name represents, and he will not now be permitted to repudiate such obligation, or to deny the legal competency of said partnership, in so far as it may be necessary to enforce the same. Bliss, Code Pleadings, sec. 255, etc.; Holbrook v. Ins. Co., 25 Minn. 229. As to the objection to the capacity of these plaintiffs to constitute a partnership, for the reason that one of them is alleged to be a corporation, it need only be said that their organization is sufficient to establish the joint interest of plaintiffs in the contract sued on, whether they were capable of executing all the powers of a partnership or not; and the relations of the partners between themselves does not concern this defendant. They are jointly interested in the debt, and may join in this action. Sharon Canal Co. v. Fulton Bank, 7 Wend. 415.

Treating the said Sandwich Company as a partnership, as it must be considered unless it be a corporation, it is not now material to the merits of this investigation that the company name is used and joined as plaintiff instead of the members represented by it. The objection for misnomer must be taken specially, and thereupon the rights of the parties may be saved by the proper amendment in the trial court.

It is too late after pleading to the merits and going to trial. Bliss Code Pleadings, sec. 427; 4 Wait Pr., 656; Bank of Havana v. Magee, 20 N. Y. 355.

Order denying new trial reversed.

WEEKLY DIGEST OF RECENT CASES.

1. ADMINISTRATION — LIABILITY OF ESTATE FOR TORTS OF ADMINISTATOR.

An action can not be maintained against an executor or trustee in his representative character for a wrongful act which was not committed by him in his official capacity. *Boston Beef Packing Co. v. Stevens*, U. S. C. C., S. D. N. Y., March 27, 1882, 12 Fed. Rep. 279.

2. AGENCY — LIMITS OF AUTHORITY — AGENT TO LEND MONEY — EVIDENCE.

Where a person living in Kansas makes an arrangement with a banking firm in another State to loan money in his own name in this States upon notes secured by real estate mortgages and to indorse for a valuable consideration the notes and mortgages to the firm, and the firm constitute by parol authority the payee of the notes their agent to receive payment thereon, whether the notes are due or not, and to release the mortgages of record—it being agreed between the firm and their agent that upon payment of any note it was to be re-indorsed and transferred back to the agent—and the payee acts in accordance with such express authority, and releases a mortgage in his own name, the firm is bound thereby, although the agent has not possession of the note and mortgage at the time of the release thereof. *Cowles v. Burns*, S. C. Kan., June, 1882, Judges' Headnotes.

3. APPEALS — FEDERAL COURTS — PRESUMPTION IN FAVOR OF LOWER COURT.

Everything being presumed in favor of the rightful action of the lower court, bills of exceptions which neither embody in themselves nor refer to the evidence contained in other parts of the record, and therefore do not show the materiality of the charge complained of, or that it prejudiced the exceptant, can not be considered here. *Jones v. Buckell*, U. S. S. C., January 16, 1882, 3 Morr. Trans., 553.

4. BANKS — EXEMPTION ON DEPOSITS IN SAVINGS BANK FROM TAXATION.

The concluding clause of section 3408 of the Revised Statutes of the United States relating to tax on deposits in savings banks, was not changed in meaning, but merely made clearer by the amendment of 1879; and means that such deposits are exempt from taxation to the extent in which they are invested in United States securities, and also to the extent of $2,000; that is, that each deposit was exempt from taxation to that extent, and not merely such deposits as did not reach that sum. *German Sav. Bank v. Archbold*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 706.

5. COMMON CARRIER — DISCRIMINATIONS IN FREIGHT RATES.

Discriminations in the rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights guaranteed to every citizen, and a wrong to the disfavored party, for which he is entitled to recover from the railroad company the amount of freight paid by him in excess of the rates accorded by it to his most favored competitor, with interest on such sum. *Hays v. Pennsylvania Co.*, U. S. C. C., N. D. Ohio, June, 1882, 12 Fed. Rep., 309.

6. CONTRACT — SALE OF GOODS — DELIVERY.

A delivery of goods by a vendor to a common carrier is a delivery to the vendee, though such carrier was not designated by him, and under the provisions of the Iowa statute of frauds that no evidence of any contract for the sale of personal property is competent when no part of the property is delivered, and no part of the price paid, such a delivery is sufficient to take the contract without the statute. *Bullock v. Stcherge*, U. S. C. C., D. Iowa, 16 West. Jur., 354.

7. CRIMINAL LAW — CONSTITUTION — TWICE IN JEOPARDY.

Defendant was indicted for both burglary and larceny in the same indictment, and was tried and

found guilty of larceny and acquitted of the burglary. A new trial was granted him, and he was retried on the entire indictment and found guilty of both burglary and larceny. *Held*, that he could not be retried for the burglary. That would be putting him in jeopardy again for the same offense. Const., art. xi., sec. 23. State v. Sims, 71 Mo. 528, does not apply. *State v. Bruffey*, S. C. Mo.

8. DAMAGES— RULE AGAINST REMOTENESS—PROSPECTIVE PROFITS.

Damages for breach of a contract can not be measured by prospective profits, because such profits are generally uncertain and speculative, but in some cases profits are the best possible measure of damages, for the very reason that the loss is indisputable and the amount can be estimated with almost absolute certainty. *Allen v. McLean*, S. C. Mich., 14 Ch. Leg. N., 351.

9. ELECTION—MERE IRREGULARITY—REJECTION OF RETURNS.

Where the ballots cast at an election precinct have all been preserved and returned, and nothing is shown indicating any unfairness or fraud in the election, the canvassers will not be justified in rejecting the entire vote of such precinct for mere irregularities on the part of the judges and clerks in conducting the election. *Bacon v. Malxacher*, S. C. Ill., May 12, 1882, at Ottawa, Reporter's Advance Sheets.

10. EVIDENCE—LIMITS OF THE RULE THAT A PARTY MAY NOT IMPEACH HIS OWN WITNESS.

Where a party to a suit introduces in evidence the deposition of the other party, the party introducing the deposition is not bound by every statement made in the same, but may rely upon other statements contained in such deposition, and also introduce other evidence for the purpose of proving his case, although these other statements and this other evidence may tend to contradict and impeach some of the statements made by the said party in his said deposition. The rule that a party shall not impeach his own witness goes only to the extent that a party shall not introduce evidence for the mere purpose of impeaching one of his own witnesses, and it does not go to the extent that he may not introduce evidence to prove the facts of his case, although, incidentally, such evidence may impeach or contradict some of the statements made by one of his previous witnesses. *Wallach v. Wylie*, S. C. Kan., June, 1882, Judges' Head Notes.

11. EXECUTION—WAIVER OF EXEMPTION.

A defendant can not waive the benefit of the exemption law, if the result be to give a junior execution creditor a preference over a prior levy on the same property. A issued execution and levied on defendant's personal property. Defendant claimed the benefit of the exemption law and $300 worth of property was set apart to him. B and C afterwards issued execution on judgments, both containing waivers of exemption, and levied on the goods exempted from A's levy. The goods were all sold by the sheriff under the three executions the same day, and failed to realize the amount of A's judgment. *Held*, that A's execution was entitled to all the proceeds of the sale. *Knoll's Appeal*, S. C. Pa., March 13, 1882, 11 W. N. C., 511.

12. FEDERAL COURTS — WILL FOLLOW STATE RULINGS.

The construction given by the Supreme Court of a State to a statute of limitations of the State will be followed by this court in a case decided the other way in the circuit before the decision of the State court. *Moores v. National Bank*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 709.

13. FRAUDULENT CONVEYANCE — EVIDENCE OF FRAUD—INTENT.

A mortgage executed by a debtor to one or more of his creditors, having the effect to hinder and delay the unsecured creditors, is fraudulent and void only when executed with a fraudulent intent on the part of the mortgagor, and when such intent is participated in by the mortgagee. A mortgage, though executed by an insolvent person, conveying all of his property, is not necessarily an assignment. It depends on the intent. Where there is nothing to indicate that the mortgagors intended anything but the giving of security, without intending to divest themselves not only of its title but of the control of the property, it is not fraudulent and void. *Kohn v. Clement*, S. C. Iowa, June 8, 1882, 12 N. W. Rep. 550.

14. FRAUDULENT CONVEYANCE — EVIDENCE OF GOOD FAITH AND INTENTION OF PARTIES.

The plaintiff sued to recover for the wrongful taking of property by defendant, as sheriff, and defendant justified under attachments issued to him against the property of B. Plaintiff proved that before the levy of the attachments he purchased the property of B, and that at the time of the levy he had the property in his possession. Defendant gave evidence tending to show that the property was transferred to the plaintiff by B with the intent to hinder, delay and defraud his creditors. After the plaintiff had testified that at the time of the purchase he had no notice of any fraudulent intent on the part of B, he was asked, under objection, "Did you make this purchase with any object or intention of aiding or assisting him to hinder, delay or defraud his creditors?" *Held*, that in such case the good faith and intention of both parties is a proper subject of inquiry, and it was proper for the purchaser to testify directly, in answer to such a question, that he did not have any fraudulent intent, and that he made the purchase in good faith. *Starin v. Kelly*, N. Y. Ct. App., 22 N. Y. Daily Reg. 73.

15. FRAUDULENT CONVEYANCE—FAILURE OF MORTGAGE TO ACCURATELY DESCRIBE GOODS.

In the absence of an intent to defraud, a mortgage is not invalidated by the failure to describe truthfully and accurately the indebtedness secured; but if subsequent creditors have not been injured by the omission of specifications, and the debt comes fairly within the general description given, identity may be established by parol. *Wood v. Weimar*, U. S. S. C., Dec. 19, 1881, 3 Morr. Trans., 387.

16. HOMESTEAD—WHAT IS PURCHASE MONEY—ASSUMPTION OF MORTGAGE.

The defendant's husband purchased the premises, assuming an overdue mortgage on them. He then quit claimed to the mortgagee; the mortgagee discharged the old mortgage, deeded back, and at the same time received a new mortgage, signed by the husband alone, in consideration of the old one. *Held* to secure the purchase money. *Davenport v. Hicks*, S. C. Vt., Reporter's Advance Sheets.

17. LEASE—NEGLECT TO RENEW—EQUITY.

A distinction is taken between the case of mere neglect to renew within the time designated in the lease, which will not exclude the party from the right of renewal, and the case of wilful neglect or refusal to renew, after which a court of equity will not interpose. *Prestman v. Silljacks*, Md.

Ct. App., April Term, 1882, 8 Md. L. Rec., May 20, 1882.

18. MALICIOUS ATTACHMENT—DAMAGES.
In an action for damages for an unlawful seizure under attachment, if the seizure is proved wrongful, but made in good faith, the jury should find for the plaintiff for actual damages only; but if they should find that the seizure was made in bad faith and maliciously, they might assess proper punitory damages in addition to actual damages proved. A seizure is wrongful if made without proper legal grounds to sustain it, and while malice is to be proved, yet the jury may infer it from evidence satisfying them of the wantonness of the seizure and oppressive conduct on the part of defendant, taking into consideration all the evidence in the case. *Tiblier v. Alford*, U. S. C. C., E. D. La., May, 1882, 12 Fed. Rep. 262.

19. NUISANCE—UNSAFE BUILDING,
Where a party leased a building as a storehouse which was unfit and unsafe for use as a storage warehouse, and it fell without any fault contributing to the fall on the part of the lessees or of the plaintiff, thereby injuring the house of the plaintiff, which was adjoining thereto, such lessor is liable for the injury. *Boston Beef Packing Co. v. Stevens*, U. S. C. C., S. D. N. Y., March 27. 1882, 12 Fed. Rep. 279.

20. PARTNERSHIP — MEMBER HAS NO POWER TO EXECUTE GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS.
One partner of a firm has not the power to execute a general assignment of all the property of the firm to a trustee, for the benefit of its creditors, without the assent, express or implied, of his copartner, when he is present and may be consulted, and is capable of expressing assent or dissent. Such a deed is absolutely void for want of authority to execute it. The fact that a fair and equitable distribution of the proceeds of the property will be made under such a deed raises no equity which demands of an attaching creditor to surrender the priority he has secured by his attachment; and the fact that the partner not assenting had instituted no proceedings to set aside the assignment, should not operate to the prejudice of such attaching creditor. *Lieb v. Pierpont*, S. C. Iowa, June 7, 1882, 12 N. W. Rep. 544.

21. PARTNERSHIP—POWERS OF PARTNER—EXECUTION OF ASSIGNMENT.
One partner has no authority to execute an assignment of the property of the firm, unless his copartner be absent, so that he can not be consulted, or is incapable from some cause of expressing either assent or dissent. The fact that under the assignment, a fair and equitable portion of the assets will be given to the complaining creditor, furnishes no ground for denying him the rights of priority which he has under his attachment. *Lieb v. Pierpont*, S. C. Iowa, 14 Ch. Leg. N., 351.

22. PARTNERSHIP—POWER OF PARTNER SETTLING UP FIRM BUSINESS—SALES ON CREDIT.
Where by the articles of dissolution of a firm which has been accustomed occasionally to sell on credit, an unlimited discretion is confided to the liquidating partner in settling with debtors, he will be held to have authority to sell the firm assets on credit, and hence, in the absence of bad faith, will not be surcharged with losses arising from such sales. *Petry's Appeal*, S. C. Pa., April 3, 1882, 11 W. N. C., 512.

23. PATENT—REISSUE—VARIANCE.
Norton's reissued patent, dated October 4, 1870, for an improved post-office stamp for printing the postmark and canceling the postage-stamp at one blow, held to be void by reason of not being for the same invention specified in the original. *James v. Campbell*, U. S. S. C., January 9, 1882, 3 Morr. Tran., 439.

24. PATENT—VOID FOR ANTICIPATION.
1. The reissued patent No. 3,274, granted January 19, 1869, to H. M. Stow for a pavement composed of square-ended and wedge-shaped blocks on a foundation-bed of sand or earth, is void for want of novelty, having been anticipated by the English patent of David Stead, issued April 23, 1839. 2. Patent No. 134,404, granted December 31, 1872, to H. M. Stow for a pavement composed of blocks laid in rows directly upon the sand foundation, with spaces between the rows filled with sand or gravel driven into said foundation, is also void for want of novelty, having been anticipated, as far as the use of wood is concerned, by the above-mentioned patent of Stead, the English patent to Lillie dated October 13, 1860, and the American patent to Willett dated May 16, 1871; as far as the filling in with sand or gravel is concerned, by the Nicholson patent, the May patent, and the Chappell patent; and as far as the ramming of the gravel between the blocks is concerned, by pavements laid in Chicago in 1864 and 1870. *Stow v. Chicago*, U. S. S. C., January 9, 1882, 3 Morr. Trans., 509.

25. PRACTICE—BILL OF REVIEW—TIME OF FILING.
It is a general rule that a bill of review to impeach a decree for fraud, will not be entertained unless brought within the time allowed by statute for the suing out of a writ of error, or unless some very cogent and convincing reason is shown in excuse of the delay. *Sloan v. Sloan*, S. C. Ill., March 28, 1882, at Ottawa, Reporter's Advance Sheets.

26. PUBLIC LANDS—OFFICE AND EFFECT OF PATENT FOR PUBLIC LANDS.
A patent for the public lands in a court of law is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority; that is, when it has jurisdiction under the law to convey the land. But it may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; as, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others. *St. Louis Smelting, etc. Co. v. Kemp*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 669.

27. PUBLIC LANDS—SALE AFTER ENTRY.
Under the act of Congress relating to the public lands, sales of the land after the entry was effected, *i. e.*, after the right to a patent had become vested, are valid, but all prior transfers are void. *Quinby v. Conlan*, U. S. S. C., January 9, 1882, 3 Mon. Trans., 487.

28. PUBLIC LANDS — TIMBER AGENTS — COMPROMISE WITH TRESPASSERS.
1. While there is no act of Congress expressly authorizing the appointment of timber agents by the Commissioner of the Land office, or by the registers and receivers of the local land offices, the appropriation of money in several acts of Congress to pay them is a recognition of the validity of their appointment. 2. The instructions of the Commissioners of the General Land Office, delivered oc-

casionally from 1855 to 1877, directing them to seize and sell timber cut from the public land, also authorized them to compromise with the trespassers on payment of a reasonable compensation for the timber cut and taken away. 3. A compromise so made, by which a trespasser agrees to pay all the costs and expenses of a seizure by one of these agents, and gives bond to pay the value of the timber when ascertained in a manner pointed out in the agreement, and does pay the actual expenses, is a valid adjustment of the matter and binds the United States. 4. On a subsequent seizure of the same property by government officers, in disregard of this settlement, and sale of it to another person, this compromise is evidence of the title of the party who took possession under it, and had held it ever since, in an action between him and the second purchaser. *Wells v. Nickles*, U. S. S. C., Jan. 16, 1882, 3 Morr. Trans., 582.

29. RECORD—REGISTRATION OF CONVEYANCE—NOTICE—LACHES.

It is the general law in America that the registration of a conveyance operates as constructive notice to all subsequent purchasers, legal or equitable, in the same property, and that as well where the conveyances are merely authorized as where they are required by law to be registered. A vendor who, although allowed by law to record his mortgage for the unpaid purchase-money in a book provided by law, neglects so to record it, it being the usage in the place of his residence to record such conveyances, is guilty of such negligence and laches, as regards a subsequent purchaser for value in good faith, that equity will require that the loss, which in consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned. *Neslin v. Wells*, U. S. S. C., January 9, 1882, 3 Morr. Trans., 472.

30. REVENUE—IMPORT DUTY ON BOOKS.

Books imported in August, 1874, were subject to a duty of twenty-five per cent. under section 2504, schedule M, of the United States Revised Statutes, and are not entitled to the reduction of ten per cent. made by section 2503 of the United States Revised Statutes made "on all paper and manufactures of paper, excepting unsized printing paper, books," etc. *Pott v. Arthur*, U. S. S. C., March 6, 1882, 3 Morr. Trans., 704.

31. VENDOR'S LIEN—WAIVER—VARIANCE.

Where a vendor accepts a mortgage on other property to secure him for the unpaid purchase money of the land sold by him, it will be presumed a waiver of the vendor's lien. Where the vendor claims relief upon the ground of fraudulent representations made by the vendee, whereby he was induced to waive his vendor's lien, he can not, at the same time, show by his testimony that he never waived the lien. *Gnash v. George*, S. C. Iowa, June 7, 1882, 12 N. W. Rep., 546.

QUERIES AND ANSWERS.

[*** *The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES ANSWERED.

Query 52. [14 Cent. L. J. 399.] C was arrested on a complaint made before a justice of the peace, charged with drunkenness. On the trial of the case, the constitutionality of the law upon which the complaint and warrant were based, was called in question by counsel for defendant. The justice of the peace held the law to be constitutional, the defendant was tried and acquitted by a jury. Since the trial of C, and in a different case, the Supreme Court have held the said law under which C was arrested to be unconstitutional. Is the justice of the peace liable for false imprisonment? R. A. L.

Salina, Kan.

Answer. In Massachusetts, a justice of the peace who issues a warrant for the arrest of a person under an unconstitutional statute, is liable for false imprisonment. Kelly v. Bemis, 4 Gray, 83; Barker v. Stetson, 7 Gray, 54. In Iowa, the rule is otherwise. Henke v. McCord, 55 Iowa, 378. See Gross v. Rice, 71 Me. JOHN H. STEWART.

Trenton, N. J.

Query 61. [14 Cent. L. J. 479.] A Kansas banking corporation is indebted to two depositors. A sues and obtains judgment. Bank suspends and becomes insolvent. The president and cashier execute a bill of sale and attach thereto the corporate seal, and sell depositor B the burglar-proof safe belonging to bank, which was used for keeping funds and valuables in. Bill of sale is recorded, but safe is not removed and remains in the vault for more than a year, when A levies on and sells it. B sues A for conversion. It appears from the testimony, uncontradicted of the president, that neither he nor the cashier had been directed or authorized by the board of directors to sell the property, make bill of sale or attach corporate seal. Can the president and cashier sell such property without special authority from the board of directors, and convey a good title as against judgment creditors without express authority? Give authorities. W. A. H. H.

Lawrence, Kan.

Answer. The bank is the principal, and the board of directors are the agents of the bank. Allen v. Custis, 26 Conn. 456. The president and cashier are simply executive officers, and have no authority by virtue of said offices to compromise claims of and against the bank, but such power rests wholly in the board of directors. Chemical Bank v. Kohner, 58 How. Pr. (N. Y.) 267; s. c., 8 Daly (N. Y.), 530. In Massachusetts, neither president nor cashier has authority, *ex officio*, to transfer the property of the company, but must be authorized by the trustees. Hallowell and Augusta Bank v. Hamlin, 14 Mass. 180; Hartford Bank v. Barry, 17 Mass. 97. New York even goes so far as to say (Abbott v. American Hard Rubber Co., 1861), that "The directors of a corporation, as such, and without special authority for that purpose, have no authority to make a sale of any portion of its property which is essential for the transaction of its customary business;" and a safe is surely an essential in the banking business. See, also, Angel & Ames on Private Corporations. My opinion is, that even granting good faith in the attempted sale, it would be void as being made without the proper authority. G.

Beloit, Kan.

Query 62. [14 Cent. L. J. 499.] Has any one of the United States ever abolished the grand jury system of proceeding against criminals, or is there now any

State in which that system is not in vogue? M. J.
St. Louis.

Answer No. 1. In answer to query 62, I quote as to Wisconsin, sec. 2545 Revised Statutes of Wisconsin: "Grand jurors shall not be summoned to attend the sittings of any court, unless the judge thereof shall make and file with the clerk an order in writing directing such jury to be summoned, and specifying the time at which such grand jury shall appear before the court, the number of days' notice or summons which shall be given them, and the number of jurors, not less than fifteen nor more than seventeen, which shall compose such jury." The grand jury system is practically abolished in this State. E. D. W.
Oshkosh, Wis.

Answer No. 2. In Wisconsin the provision of the Constitution requiring grand juries was abrogated in 1870, and in 1871 a law passed under which they are summoned only by special order of the judge. The same law is in existence now as sec. 2545 Rev. Stat., and the system is not now in vogue.
Hartford, Wis. E. AUG. RUNGE.

Answer No. 3. Yes; that expensive, utterly useless, and at times vicious piece of legal machinery —the grand jury—is practically abolished in the State of Michigan. The act of 1859, upon the subject, provided in effect, that no grand jury should be summoned to attend the sittings of any court, unless the judge thereof should so order in writing. Since then grand juries have been unknown here. Persons charged with crimes which justices of the peace may not try and dispose of finally, have a preliminary examination before the justice of the peace or other judicial officer issuing the warrant of arrest, where the testimony of the witnesses, both for the prosecution and the defendant, is reduced to writing and subscribed by the witnesses, and returned with the other papers to the trial court. If the examining magistrate finds from the proofs so taken, that the crime charged has been committed, and that there is probable cause to believe the accused guilty thereof, he so certifies, and commits him for trial, or lets him to bail in cases bailable by the magistrate; the evidence not warranting a commitment, the accused is discharged by the examining magistrate. In theory no person is committed for trial unless the proofs taken are such as to make it reasonably probable that he is guilty as charged. Of course, improper commitments do sometimes (though rarely) take place, but the prosecuting attorney, of the proper county, by leave of the court, and upon filing in writing his reasons therefor, may enter a *nolle prosequi* in cases that ought not to be prosecuted. In practice the system works well, and certainly much better than the secret, one-sided, and often malicious investigation of a grand jury. D. P. FOOTE.
Saginaw, Mich.

Query 65. [14 Cent. L. J. 499.] John Brown owned a farm of 155 acres in fee simple. He made his will, giving to his son, John H., ninety-five acres, and to his daughter, Martha A., sixty acres, both subject to the life estate of Mary J., wife of John, the testator. John Brown died July 2, 1858; John H. and Martha A. and the widow all survived him. Martha A. afterwards intermarried with James Marshall on the 5th day of March, 1859; they had as issue one son, Clement Marshall. Martha A. died on the 17th of January, 1861, and her son Clement died on the 28th of same month, and John H. on the 2nd day of February, 1861. The parties all died intestate. Mary J., the widow of John, the testator, died on the 19th of November, 1881, also intestate. The question is, Where is the title to the land owned by John Brown, the testator, at the death of his widow, Mary J. Brown? Does it go to her brothers and sisters? L.
Steubenville, O.

Answer. Mary J. Brown, widow of testator, had merely a life estate in the land, and therefore when she died her estate terminated, and no one could take as her heir. John H., the son, and Martha A., daughter, took vested remainders under the will, and are entitled to ninety-five and sixty acres, respectively; upon the death of Martha A., her son, Clement Marshall, became heir to the sixty acres. James Marshall is not entitled to courtesy, because Martha A. was not seized in possession during coverture. Whoever, under the law of Ohio, is heir to Clement Marshall, is now entitled to the sixty acres; whoever is heir to John H., under the law of Ohio, is entitled to the ninety-five acres. No one can take under Mary J. Brown, as her interest expired when she died. Consult the statutes of Ohio for details of solution. M. N. SALE.
St. Louis, Mo.

RECENT LEGAL LITERATURE.

POMEROY'S EQUITY JURISPRUDENCE.—A Treatise on Equity Jurisprudence, as Administered in the United States of America; Adapted for all the States, and to the Union of Legal and Equitable Remedies under the Reformed Procedure. By John Norton Pomeroy, LL. D. In three volumes. Vol. 2. San Francisco, 1882: A. L. Bancroft & Co.

We have heretofore given an account of the scope and plan of this work, and called attention to the author's peculiar views as to the development of equity as a system under the reformed procedure. As to the volume before us it is only necessary to say that it in every respect fulfils the expectation aroused by its predecessor, and exhibits in every part the customary care and faithfulness of its author.

CHANEY'S INDEX DIGEST. Index-Digest of the Decisions of the Supreme Court of the State of Kansas, Embraced in McCahon's Reports, and Volume one to twenty-five Kansas Reports, with references to the Compiled Laws of 1879; also a Complete Table of Cases Affirmed, Approved, Cited, Distinguished, Criticised, Doubted or Overruled in Subsequent Decisions of the Court. By George R. Chaney. Chicago, 1882: E. B. Myers & Co.

There are two peculiarities which distinguish this volume from the usual thing, in the way of an index to reports, and renders it much more valuable than it would be otherwise. One is the table of cases affirmed, overruled, etc., the immense practical value of which, must necessarily be apparent to the reader. The second peculiarity is that the cases are all cited by their titles and not by the mere number of the volume and page, and consequently the possibility of mistakes s much lessened and the labor of research, lightened. The volume, it seems to us, must be invaluable to the local practitioner in Kansas,